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Public Prosecutor v Razif Hanif bin Abdul Rahim

B HIGH COURT (KUCHING) — CRIMINAL NO KCH-45A–5/11 OF 2019
ALWI ABDUL WAHAB J
11 JANUARY 2021

C *Criminal Law — Dangerous Drugs — Trafficking — Accused charged with trafficking cannabis — Whether prima facie case had been made out — Whether caution was properly administered and accused understood cautionary words — Whether evidence pertaining to statement made by accused that led to discovery was admissible — Whether prosecution could prove element of possession* D *— Dangerous Drugs Act 1952 s 39B(1)(a)*

On 17 June 2019, at about 7pm, a police team in civilian clothes headed by PW5 raided a house ('the first house'). Upon entering the house, they spotted the accused with one woman at the staircase. They were then brought to one of E the bedrooms upstairs where the other man was found inside. In the presence of the accused and two others, PW5 administered caution orally and after that asked question to the accused in relation to the drugs including whether there were drugs kept in the house. The accused answered: 'Ada, dadah jenis ganja berat lebih kurang 400g, di bahagian dapur rumah'. There was nothing F incriminating found after bodily search was conducted on the accused, neither was there any drugs found inside the first house. The accused and the other two occupants of the first house ie Asmieza Fatin bt Dollah ('Asmieza') and Augustino bin Bujang were subsequently brought to the narcotic office at IPK Sarawak. Based on the information obtained from the accused, PW5 and the G raiding team proceeded from IPK Sarawak to another house ('the second house'). When the raiding team arrived at the second house at about 8.30pm, they were led by the accused to the side door of the kitchen at the back of the house leading to the kitchen area. Before entering the kitchen area of the house, PW5 again administered caution orally to the accused. At the kitchen area of H the house, the accused then took one paper bag ('the paper bag') behind the wood structure from the ceiling above the kitchen area and the paper bag was subsequently handed to PW5. Upon inspection of the paper bag by PW5, it contained two compressed dried leaves suspected to be cannabis. The drugs were seized and brought to the narcotic office at IPK Sarawak. The accused was I charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same for trafficking in 395.9g of cannabis. The accused pleaded not guilty to the charge and claimed trial.

Held, acquitting and discharging the accused:

(1) The cautionary words were not properly administered to the accused. On both occasions, the accused was not asked whether he understood the nature of the caution and its consequences. PW5's failure to have the caution explained to the accused would render the caution to be inadmissible. Further, the caution that was administered, even if it was true, would have caused confusion to the accused as to whether such caution was addressed to him individually or to all the three namely the accused and two others who were present at the first house collectively. Furthermore, the allegation by the raiding team that the accused himself took out the paper bag containing drugs from the ceiling of the second house was not supported as the search list did not mention such important fact of how the drugs were discovered although it was otherwise mentioned in the police report. Such evidence, if accepted, would only caused prejudice to the accused as its prejudicial effect outweighed its probative value (see paras 20, 23 & 25).

(2) The information leading to the discovery of the exhibits was no doubt relevant and admissible under s 27 of the Evidence Act. However, the prosecution had failed to prove that the requirements for the admissibility of the evidence pursuant to that section were fulfilled. The information given by the accused that the drugs were kept in the house did not distinctly refer to the second house as the information was very general in nature which could also refer to the kitchen of the first house itself. Since the statement allegedly given by the accused was vague as it did not refer to a specific location, it was therefore inadmissible (see paras 26–27).

(3) It followed that the prosecution could not impute knowledge on the part of the accused to prove that the accused was aware of the existence of the drugs in the second house. Although the accused took the paper bag out from the ceiling of the kitchen area as alleged, it could not be gainsaid to say that the accused had full custody and control over it to the exclusion of others because the second house was accessible to others which included the accused's relatives and family members, their neighbours and friends. Asmieza was indeed a material witness and the failure by the prosecution to call her to establish custody and control of the drugs exhibit found in the kitchen was fatal. The accused ought to be given the benefit of doubt for the prosecution's failure to call the necessary witness. Therefore, the prosecution had failed to make out a prima facie case at the conclusion of the prosecution's case (see paras 30–31, 33 & 35).

[Bahasa Malaysia summary

Pada 17 Jun 2019, kira-kira pukul 7 malam, sepasukan polis berpakaian awam yang diketuai oleh PW5 menyerbu sebuah rumah ('rumah pertama'). Sebaik memasuki rumah, mereka melihat tertuduh bersama seorang wanita di tangga. Mereka kemudian dibawa ke salah satu bilik tidur di tingkat atas di mana lelaki

lain ditemui di dalam. Di hadapan tertuduh dan dua yang lain, PW5 memberi pernyataan amaran secara lisan dan setelah itu mengajukan pertanyaan kepada tertuduh berkaitan dengan dadah termasuk sama ada terdapat dadah yang disimpan di dalam rumah. Tertuduh menjawab: 'Ada, dadah jenis ganja berat lebih kurang 400g, di bahagian dapur rumah'. Tidak ada yang apa-apa yang mencurigakan dijumpai setelah carian badan dilakukan terhadap tertuduh, dan tidak ada dadah yang dijumpai di dalam rumah pertama. Tertuduh dan dua penghuni rumah pertama iaitu Asmieza Fatin bt Dollah ('Asmieza') dan Augustino bin Bujang kemudiannya dibawa ke pejabat narkotik di IPK Sarawak. Berdasarkan maklumat yang diperoleh daripada tertuduh, PW5 dan pasukan serbuan meneruskan perjalanan dari IPK Sarawak ke rumah lain ('rumah kedua'). Ketika pasukan serbuan tiba di rumah kedua kira-kira pukul 8.30 malam, mereka diketuai oleh tertuduh ke pintu dapur di bahagian belakang rumah yang menuju ke kawasan dapur. Sebelum memasuki kawasan dapur rumah, PW5 sekali lagi memberi pernyataan amaran secara lisan kepada tertuduh. Di kawasan dapur rumah, tertuduh kemudian mengambil satu beg kertas ('beg kertas') di belakang struktur kayu dari siling di atas kawasan dapur dan beg kertas itu kemudiannya diserahkan kepada PW5. Setelah beg kertas diperiksa oleh PW5, terdapat dua daun kering yang dimampatkan yang disyaki ganja. Dadah itu dirampas dan dibawa ke pejabat narkotik di IPK Sarawak. Tertuduh didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) yang sama kerana mengedar 395.9g ganja. Tertuduh mengaku tidak bersalah atas tuduhan itu dan menuntut perbicaraan.

Diputuskan, melepas dan membebaskan tertuduh:

(1) Pernyataan amaran tidak diberikan dengan betul kepada tertuduh. Pada kedua-dua keadaan tersebut, tertuduh tidak ditanya sama ada dia memahami sifat pernyataan amaran dan akibatnya. Kegagalan PW5 untuk memberi pernyataan amaran kepada tertuduh akan menjadikan pernyataan amaran itu tidak dapat diterima. Selanjutnya, pernyataan amaran yang diberikan, walaupun betul, akan menimbulkan kekeliruan kepada tertuduh mengenai sama ada pernyataan amaran itu ditujukan kepadanya secara individu atau kepada ketiga-tiga mereka iaitu tertuduh dan dua orang lain yang hadir di rumah pertama secara kolektif. Selanjutnya, tuduhan oleh pasukan serbuan bahawa tertuduh sendiri mengeluarkan beg kertas yang mengandungi dadah dari siling rumah kedua tidak disokong kerana senarai carian tidak menyebutkan fakta penting tentang bagaimana dadah itu ditemui walaupun dinyatakan sebaliknya dalam laporan polis. Bukti seperti itu, jika diterima, hanya akan menimbulkan prejudis terhadap tertuduh kerana kesan prejudis itu melebihi nilai probatifnya (lihat perenggan 20, 23 & 25).

(2) Maklumat yang membawa kepada penemuan ekshibit tidak diragukan lagi adalah relevan dan dapat diterima di bawah s 27 Akta Keterangan.

Walau bagaimanapun, pihak pendakwaan gagal membuktikan bahawa syarat-syarat untuk keterangan yang boleh diterima berdasarkan seksyen tersebut telah dipenuhi. Maklumat yang diberikan oleh tertuduh bahawa dadah tersebut disimpan di dalam rumah tidak secara jelas merujuk kepada rumah kedua kerana maklumat tersebut sangat umum dan juga boleh merujuk kepada dapur rumah pertama itu sendiri. Oleh kerana pernyataan yang didakwa diberikan oleh tertuduh adalah kabur kerana tidak merujuk ke lokasi tertentu, maka ia tidak dapat diterima (lihat perenggan 26–27).

(3) Oleh kerana itu, pihak pendakwaan tidak dapat menganggap pengetahuan di pihak tertuduh untuk membuktikan bahawa tertuduh mengetahui adanya dadah di rumah kedua. Walaupun tertuduh mengeluarkan beg kertas itu dari siling ruang dapur seperti yang didakwa, tidak dapat dikatakan bahawa tertuduh mempunyai jagaan dan kawalan penuh sehingga mengecualikan orang lain kerana rumah kedua dapat diakses oleh orang lain yang termasuk saudara-mara dan ahli keluarga tertuduh, jiran dan rakan mereka. Asmieza sememangnya menjadi saksi penting dan kegagalan pihak pendakwaan memanggilnya untuk membuktikan jagaan dan kawalan terhadap ekshibit dadah yang dijumpai di dapur adalah fatal. Tertuduh harus diberi kelebihan keraguan atas kegagalan pihak pendakwaan untuk memanggil saksi yang diperlukan. Oleh itu, pihak pendakwaan gagal membuktikan kes prima facie pada akhir kes pendakwaan (lihat perenggan 30–31, 33 & 35).]

Cases referred to

Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408, CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pendakwa Raya v Chong Chee Wah [2016] MLJU 395, HC (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
PP v Kang Choo Heng & Anor [1991] 3 CLJ Rep 545, HC (refd)
PP v Tiong Wee Kiet [2019] 1 MLJ 634, CA (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37B(1)(b), 39B(1)(a), First Schedule
Evidence Act 1950 ss 8, 27

Ronie Entili (Deputy of Public Prosecutor, Attorney General's Chambers) for the prosecution.
Osman Ibrahim (Osman Ibrahim & Co); Roger Chin (Roger Chin & Co) for the accused.

Alwi Abdul Wahab J:

INTRODUCTION

[1] The accused is charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same for trafficking in 395.9g of cannabis.

[2] The charge is as follows:

> That you on 17 June 2019, at about 2030 hrs., at house No. 609, Jalan Haji Kassan, Kampung No.4, in the District of Kuching, in the State of Sarawak, did traffic in dangerous drugs, to wit 395.9 grammes of Cannabis, thereby you have committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under subsection 39B(2) of the same Act.

[3] The accused pleaded not guilty to the charge and claimed trial.

[4] At the close of the prosecution case, I find that the prosecution has failed to make out a prima facie case against the accused. He is accordingly discharged and acquitted without calling for his defence.

[5] Aggrieved by my decision, the learned deputy public prosecutor filed an appeal to the Court of Appeal appealing against my decision.

[6] I now give my grounds of decision.

THE PROSECUTION'S CASE

[7] The prosecution called eight witnesses in order to prove its case and they are as follows:

(a) PW1: D/Kpl Desmond Machi ak Edmund Ngumbang;

(b) PW2: Mohd Arip bin Julaihi;

(c) PW3: Aishah bt Abdul Aziz;

(d) PW4: Insp Suhail bin Saaidi;

(e) PW5: Insp Thomas ak Untol;

(f) PW7: Kpl Pilot Lanye;

(g) PW8: Insp Suresh a/l Segaran; and

(h) PW6: D/Kpl Harman bin Ismail.

[8] On 17 June 2019, at about 1900 hours, a police team in civilian clothes headed by PW5 raided a house at Lot 11644, Tabuan Jaya Baru, Phase 1, Jalan Stutong Kuching ('the first house'). Upon entering the house, they spotted the accused with one woman at the staircase. They were then brought to one of the bedrooms upstairs where the other man was found inside. In the presence of the accused and two others, PW5 administered caution orally and after that asked question to the accused in relation to the drugs including whether there were drugs kept in the house. The accused answered: 'Ada, dadah jenis ganja berat lebih kurang 400g, di bahagian dapur rumah'. There was nothing incriminating found after bodily search was conducted on the accused, neither was there any drugs found inside the first house. The accused and the other two occupants of the first house ie Asmieza Fatin bt Dollah and Augustino bin Bujang were subsequently brought to the Narcotic Office at IPK Sarawak, Jalan Badruddin, Kuching.

[9] Based on the information obtained from the accused, PW5 and the raiding team comprising of PW6, D/SM Razali, Kpl Yaacub, L/Kpl Ezra proceeded from IPK Sarawak to the house at No 609, Jalan Hj Kassan, Kampung No 4 Kuching, Sarawak ('the second house').

[10] When the raiding team arrived at the second house at about 2030 hours, they were led by the accused to the side door of the kitchen at the back of the house leading to the kitchen area as shown in photograph exh P3(6) and marked as 'Y' in the sketch plan exh P20. Before entering the kitchen area of the house, PW5 again administered caution orally to the accused. At the kitchen area of the house, the accused then took one paper bag written 'SASA' behind the wood structure from the ceiling above the kitchen area as shown in photograph marked 'X' in exh P3(14) and the said paper bag was subsequently handed to PW5. Upon inspection of the paper bag by PW5, it contains two compressed dried leaves suspected to be cannabis.

[11] The drugs were seized and brought to the Narcotic Office at IPK Sarawak. PW5 weighed the drugs exhibit, made the marking on them and lodged two police reports exhs P16 and P17. PW5 had the custody and control of all the exhibits from the time of its seizure until they were handed over to PW8, the investigating officer of the case. PW5 also prepared the sketch plan of the crime scene at the second house (exh P20).

[12] After receiving all the exhibits, PW8 examined them and saw the marking made by PW5 on the same. PW8 then kept all the exhibits in his safety locker in his office and the key to the safety locker was kept by him solely. In addition to the marking made by PW5, there were also markings made by PW8 on all of the exhibits as follows:

(a) 'S' on the surface of the paper bag written 'SASA' (exh P11);

(b) 'S1' on the surface of the transparent plastic bag (exh P11(A));

(c) 'S2' on the surface of the transparent plastic wrapping (exh P11(B)); and

(d) 'S3' on the surface of the transparent plastic wrapping (exh P11(C)).

[13] PW8's investigation revealed that the second house belonged to the late grandmother of the accused who is also the late mother of PW2. The accused, his uncle PW2 and both PW2's daughter and PW2's younger sister were living inside the house. In the course of his investigation, PW8 sent all the exhibits that he received from PW5 to the Forensic Department of IPK Sarawak for fingerprint lifting test. The exhibits were received by PW4 who also conducted the fingerprint lifting test but the result was negative. PW3, the chemist also received the exhibits from PW8 and upon her analysis, she found that the net weight of the dried plant material inside transparent plastic wrapping of 'S2' and 'S3' was 395.9g and that dried plant material was confirmed to be 'cannabis' (exh P12). PW3 had prepared a Chemist Report dated 8 July 2019 which is marked as exh P9.

[14] Based on the above evidence, the prosecution submitted that it has proven that the drugs were in the accused's possession which means that when the drugs were seized by the police, the accused had control, custody and knowledge of the same. The prosecution also submitted that it had proven that the drugs ie cannabis is listed in the First Schedule of the DDA with the weight of 395.9g. Hence, a prima facie case has been made out.

WHETHER A PRIMA FACIE CASE HAS BEEN MADE OUT

[15] At this stage, it is pertinent to deal with the issue of possession as to whether the drugs that were taken from the ceiling of the kitchen area in the second house were under the custody, care and control of the accused to the exclusion of others.

[16] The accused disclosed information that led to the discovery of the impugned drugs at the second house in which house he was staying with the other members of his family. The paper bag written 'SASA' (exh P11) containing drugs was picked up by the accused from the hidden and concealed area of the ceiling at the kitchen area.

[17] From the factual matrix of the case as shown above, it appears to the prosecution that the accused has an exclusive power to deal and dispose of the drugs. The conduct of the accused in taking and showing the place where the drugs were hidden was a clear indication of the accused's knowledge of the existence of the drugs. In other words, if not for the specific information relayed by the accused who then led the raiding party to the second house, the

exact location of the drugs would not have been known to the raiding party. The information given by the accused prior to the raiding of the second house is clearly a distinct information which has led to the discovery of the impugned drugs. Such evidence is relevant and admissible under s 27 of the Evidence Act 1950. Even if such evidence is not considered by the court, the subsequent conduct of the accused in picking up the paper bag written 'SASA' which contained the impugned drugs should be accepted by the court which falls under s 8 of the Evidence Act 1950.

[18] Further, the prosecution submitted that the whole event was consistent with the police reports exhs P16 and P17 lodged by PW5 and supported by the evidence of PW6, the other member of the raiding team especially on the discovery of the impugned drugs in the second house. Therefore, the prosecution submitted there were overwhelming affirmative evidence of possession of dangerous drugs that had been proven against the accused. The evidence is sufficient to establish the elements of the charge and the accused ought to be called to enter his defence.

[19] With regards to the alleged possession of the impugned drugs, it is equally important, in my view, to consider the following subsidiaries issues which are: whether the caution was properly administered and the accused understood the cautionary words; and, whether the evidence given by PW5 pertaining to the statement made by the accused that led to the discovery of the drugs is admissible.

WHETHER THE CAUTION WAS PROPERLY ADMINISTERED AND THE ACCUSED UNDERSTOOD THE CAUTIONARY WORDS

[20] Although the prosecution adduced evidence that the caution was administered orally to the accused, following the case law authorities, it is insufficient to merely say it was read and administered without more. The caution must be audibly explained and the accused must be asked whether he understood the caution. From the evidence adduced before the court, I am of the view that the cautionary words were not properly administered to the accused. On both occasions, the caution was not audibly explained to the accused and he was not asked whether he understands the nature of the caution and its consequences. Further, it was not proven whether the caution was administered individually or collectively since the oral caution was administered in the presence of the accused and two others.

[21] In connection with the above issue, the High Court in *Pendakwa Raya v Chong Chee Wah* [2016] MLJU 395 held as follows:

> [29] Berhubung kata-kata amaran di bawah Akta Dadah Berbahaya 1952 ini yang dahulunya di bawah seksyen 37A(1) Akta yang sama, banyak nas undang-undang

telah menjelaskan perkara ini diantaranya oleh Mahkamah Rayuan dalam kes *Ngu Chee Wui v Public Prosecutor* [2014] MLJU 1720 yang menyatakan:

> [15] ... The purpose of cautionary words to be administrated to the appellant (or a suspect) was to alert the appellant to his right to remain silent. Therefore, in our view it is extreme importance that the caution must be properly and legally administrated using words which would be clearly understood by a suspect (in this case the appellant). The ideal situation is of course to read to the appellant the very words of caution that are stated in proviso (b) to S 37A(1) of the Act. However, if the exact words could not be remembered or cited, words to the like effect would be sufficient. Whether or not a proper caution had been administered to a suspect can only be judged from the very words used by the police officer who administered the caution. In our view it is insufficient for a police officer who had administered the caution to a suspect merely to testify in court that he had administered the caution but without stating the exact words that were used by him to administer the caution. In *Public Prosecutor v Mohd Fahmi bin Hamzah* [2002] 6 MLJ 340, referred to us by learned counsel for the appellant in his written submission, the same issue (that is learned counsel for the accused in that case contended that PW5 merely said that he administered the caution but there was no evidence of the exact caution that was administered) was discussed. In that case the court agreed with the submission of the teamed counsel that there must be evidence of the precise words of the caution that was administered. Evidence of the words of the caution that was administered is a statutory pre-condition to the admissibility of a cautioned statement. The court in that case went on to say that:
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> > the requirement that the court must be satisfied that the caution was administered '... in the following words or words to the like effect ...' is a statutory direction to the court to ensure that the prescribed caution has been administered. This is significant as this means that there must be evidence of the caution that was administered. In the absence to such evidence, the court will not be able to rule whether the prescribed caution or words to the like effect were administered. Thus, the actual words of the caution that was administered must be adduced in evidence. This caution enshrines in-built rights like, for instance, the right of silence. It is therefore important to ensure that these rights have been properly communicated to an accused person. In the circumstances, a mere statement that a caution was administered is insufficient ...
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> [16] The principle was endorsed by the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481, when the court said that:
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> > It can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being 'satisfied' that it had been administered ...
> >
> > The court can be 'satisfied' that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the court would be in a position to determine whether the caution that was administered

is as prescribed or to the like effect or is something that is different ... A

It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution that he read is as recorded in the cautioned statement ... B

The result is that there is no evidence before the court in order to be 'satisfied' whether the caution that was administered is as prescribed or contain words to the like effect.

[30] Dalam kes ini, SP6 dikatakan telah memberi kata-kata amaran di bawah s 37B(1)(b) kepada OKT selepas ditangkap. Ini dinyatakan dalam laporan polis SP6 (P32). Walau bagaimanapun, perkataan-perkataan amaran tersebut tidak dinyatakan dalam P32 berkenaan. Peguam OKT juga telah mempertikaikan kata-kata amaran yang diberikan ini. Di mahkamah, SP6 menyatakan secara umum SP6 memberitahu OKT boleh mendiamkan diri dan apa yang beliau beritahu, boleh digunakan di mahkamah. Walau bagaimanapun, SP6 tiada menyatakan apakah perkataan perkataan yang digunakan bagi memaklumkan kepada OKT amaran di bawah s 37B(1)(b) ini. C D

[22] In a more recent case of *Public Prosecutor v Tiong Wee Kiet* [2019] 1 MLJ 634, Zabariah Mohd Yusof JCA (now FCJ) held as follows: E

[40] ...

(a) ...

(b) ... There was also no evidence of the exact words of the caution, and neither was there evidence that the caution was explained and if explained, what was the explanation like (refer to *Ngu Chee Wui v Public Prosecutor* [2016] 6 MLJ 190; [2015] 9 CLJ 562). A mere reading of the caution would not be sufficient. The consequences of the caution must be explained to the accused as the implication of the answers given after the caution is read is very crucial and can incriminate the accused person (refer to *Public Prosecutor v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652*)*. F G

The caution is to alert the accused that he has the right to remain silent. Hence, the rationale for the caution to be properly read and administered using the words which would be properly understood by the accused person ... H

[23] In the present case, PW5 had administered caution to the accused and two others after their arrest during the raid at the first house at Tabuan Jaya Baru. PW5 also administered caution to the accused at the second house at Jalan Hj Kassan. Both the police report lodged by PW5 in exhs P16 and P17 mentioned that he had administered the caution particularly to the accused under s 37B(1)(b) of the DDA 1952 but there was no mentioned of whether the caution that was alleged to be administered had been explained to the accused. When testified in court, PW5 described how he administered the I

caution and the words he used in the caution. Such words were not stated in both police reports. In the light of the above authorities, for the caution to be effectively administered there is a requirement in law that the caution has to be explained and the accused must be asked in language that he understands as to whether he truly understood the consequences of such caution. PW5's failure to have the caution explained to the accused would render the caution to be inadmissible. Further, the caution that was administered, even if it is true, would have caused confusion to the accused as to whether such caution was addressed to him individually or to all the three namely the accused and two others who were present at the first house collectively (*Public Prosecutor v Kang Choo Heng & Anor* [1991] 3 CLJ Rep 545).

[24] PW6, a policeman who was present when the caution was administered by PW5 could not understand the form of caution administered to the accused and/or two others and under what circumstances it was given. Similarly, if indeed the caution was administered, the accused too would not be able to understand the form of caution administered by PW5 if it was not explained to him, to begin with. It was as if no caution had been administered which renders the evidence adduced by the prosecution relating to the conduct of the accused in plucking the drug exhibits from the ceiling inadmissible.

[25] Furthermore, the allegation by the raiding team that the accused himself took out the paper bag written on it 'SASA' containing drugs from the ceiling of the second house was not supported as the search list (exh P18) did not mention such important fact of how the drugs were discovered although it was otherwise mentioned in the police report exh P17. The Prosecution even alleged that the accused was using a chair to take out the impugned drugs from the ceiling but again there was nothing mentioned in the police report exh P17 and neither was there any physical evidence tendered nor the photographs showing the alleged chair being used by the accused. Such evidence, if accepted, would only cause prejudice to the accused as its prejudicial effect outweighed its probative value.

WHETHER THE EVIDENCE GIVEN BY PW5 PERTAINING TO THE STATEMENT MADE BY THE ACCUSED THAT LED TO DISCOVERY IS ADMISSIBLE

[26] PW5 testified that the accused admitted that he had kept the drugs at the kitchen area and the drugs approximately weighed 400g when PW5 asked the accused whether there were drugs kept in the house. The information leading to the discovery of the exhibits is no doubt relevant and admissible under s 27 of the Evidence Act. In the present case, however, the prosecution has failed to prove that the requirements for the admissibility of the evidence pursuant to that section are fulfilled. There were no contemporaneous

documents such as 'station diary' or any written statement produced by the prosecution to show the exact words used in the questions and answers during the interrogation which must be acknowledged and signed by them as proof that there was such a statement leading to the discovery of the drugs. In the Court of Appeal's case of *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408, it was held that the exact words spoken by an accused have to be proved to ensure that the evidence given by the police under s 27 of the Evidence Act is credible bearing in mind that such statement is vulnerable to abuse (see also *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137).

[27] Furthermore, the information supplied by the accused to the police under s 27 of the Evidence Act must relate distinctly to the fact discovered which means that such information much specifically referred to the exact location where the object is discovered (*Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176). In the present case, the information given by the accused that the drugs were kept in the house does not distinctly refer to the second house at Jalan Hj Kassan as the information was very general in nature which could also refer to the kitchen of the first house itself. There was no evidence given by both PW5 and PW6 that they had conducted a search in the kitchen of the first house. Their testimony in court merely stating that they have done a search in the bedroom of the first house including bodily search but no drugs were found (see exh P16). It was only after the search was conducted that PW5 allegedly asked the accused whether he did keep the drugs in the house and the accused answered he kept it in the kitchen of the house. Since the statement allegedly given by the accused was vague as it does not refer to a specific location, it is therefore inadmissible. Viewed differently, the evidence adduced by the prosecution suggests that the police raiding team had prior knowledge and information of the drugs kept in the second house when PW5 asked the accused whether he did keep the drugs after they had already conducted the search in the first house including a bodily search on the accused and found nothing incriminating. In other words, although there was nothing found on the accused's body and in the bedroom of the first house at Tabuan Jaya Baru, the raiding team had still insisted to ask the accused as regards to the purported impugned drugs as if they knew the accused had the second house where the drugs were kept. If it was true that the accused had given such information on the whereabouts of the drugs in the second house, why would the police raiding team needed to bring the accused and the others to the Narcotic Office, IPK Sarawak from the first house instead of going straight to the location of the discovery. It may just be possible that the raid at the second house took place after the interrogation which was carried out at the IPK.

[28] If we look at the timeline from the raid at the second house at 2030 hours to the lodging of the police report in exhs P16 and P17 at 2136 hours and 2151 hours respectively at IPK, one would see that the raiding team would

have taken at least approximately around one hour to recover the drugs exhibits going by the evidence of PW6 that it took roughly about 5 minutes to travel from the second house to the IPK at night. The time taken of approximately around one hour to discover the exhibits in the second hours is indicative of a search being carried out by the raiding team itself and not from the source of information given by the accused.

[29] In the present case, it was also PW5's evidence that the drugs were weighed at the Narcotic Office, IPK Sarawak. In other words, the weight of the drugs was only known after the raid at the second house and not before. Hence, it was highly unlikely that the statement of the accused to PW5, if any, would include the specific amount of weight of the drugs. Moreover, PW6 who was present at the crime scene testified that the actual words used by the accused in the alleged admission as he could recall was without the amount of weight of the drugs which again suggests that the accused's statement, if any, must be viewed with caution as it may have been reworded by PW5. It must be borne in mind that the alleged statement by the accused was only recorded in the police report exh P16 after two and half hours from the raid at the first house at Tabuan Jaya Baru, the possibility of PW2 to paraphrase the statement, therefore, cannot be dismissed.

WHETHER THE PROSECUTION CAN PROVE THE ELEMENT OF POSSESSION

[30] In the light of my findings that the caution was not properly administered and the evidence or the information obtained from the accused allegedly pursuant to s 27 of the Evidence Act was not admissible, it follows that the prosecution cannot impute knowledge on the part of the accused to prove that the accused was aware of the existence of the drugs in the second house.

[31] One important factor which is always associated with possession is the accessibility to the place where the drugs were found. In the present case, although the accused took the paper bag written 'SASA' out from the ceiling of the kitchen area as alleged, it cannot be gainsaid to say that the accused had full custody and control over it to the exclusion of others. This is because it was an undisputed evidence that the second house is accessible to others which include the accused's relatives and family members, their neighbours and friends. PW2's evidence that many others had accessed to the second house especially around and inside the kitchen area prior to the raid was unchallenged. The access to the kitchen area is much easier for outsiders because according to PW2, the side door and back door of the kitchen (shown in the photographs exhs P3(6) and P3(10)) were unlocked as there were no keys to the locks which were already damaged. During cross-examination, PW6 agreed that when the

raiding team entered the house through the side door, PW5 just pushed the door to let them in as the door was unlocked. The same door could not even be locked from inside according to PW2 which means that anyone could enter the house at their own convenient time. The evidence of PW2 was also not challenged when he testified that the compound at the side and the back of the second house were not fenced up which made it easier for anybody including the relatives staying from the surrounding area to enter.

[32] In *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137, the Supreme Court held that although the appellant had knowledge of the presence of the heroin in the room, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others had access to the room and could have concealed the heroin there. To prove possession, the knowledge of the presence of the drug and the custody as well as control over the substance must be proved by evidence of equivalent effects (*Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576).

[33] It was evident before the court that one woman identified as Nur Asmieza Fatin bt Dolah showed up and opened the door for the investigating officer PW8 to enter the second house on 18 June 2019, a day after the alleged offence and this same woman was seen and arrested in the first house earlier. This Asmieza who had access to the second house in particular the kitchen area where the drugs were found was not called by the prosecution to exclude her as a possible suspect on the custody and control of the drugs. PW8 agreed that Nur Asmieza had full access to the crime scene where the drugs were found. I could not agree more with the defence that Asmieza is indeed a material witness and the failure by the prosecution to call her to establish custody and control of the drugs exhibit found in the kitchen is fatal. It is fundamental that the burden lies on the prosecution to prove its case. If there are gaps, it must only be filled by the prosecution itself. The strict requirement of proof in criminal cases cannot be relaxed to bridge any material gap in the prosecution's evidence regardless of whether the court is otherwise convinced of the guilt of the accused (*Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116). The accused in the present case ought to be given the benefit of doubt for the prosecution's failure to call the necessary witness named above.

[34] In giving his evidence in court, PW5 was unsure about the door which the raiding party purportedly used to enter during the raid at the second house. When shown with the sketch plan exh P20, he indicated the side door as the back door and marked it as 'Y'. It can be seen clearly from the photographs that the doors as in exh P3(6) which is the side door and exh P3(10) which is the back door are heading to two different places in the said kitchen area. As the sketch plan exh P20 was drawn up by PW5 himself, it is therefore impossible

for PW5 to be confused unless if he wasn't there in the first place at the time of the raid. PW5 even described the second house which is a double-storey house as a single-storey house.

CONCLUSION

[35] Based on the above reasons, I am of the view that the prosecution has failed to make out a prima facie case at the conclusion of the prosecution's case. The accused is, therefore, acquitted and discharged. The exhibits are to be disposed off after the lapse of the appeal period.

Accused acquitted and discharged.

Reported by Ahmad Ismail Illman Mohd Razali